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Supreme Court, U.S.
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No. 86-___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIN K. LEE,

Petitioner,

VS.

JOHN LEHMAN, SECRETARY OF THE NAVY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

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QUESTION PRESENTED

Whether the *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973) formula applies when direct evidence of racial animus is present in a Title VII case.

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JIN K. LEE,

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JOHN LEHMAN, Secretary of the Navy,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this action on October 22, 1986.

OPINION BELOW

The Memorandum Opinion of the Court of Appeals for the Ninth Circuit, and the Findings of Fact, Conclusions of Law, Order and Judgment of the District Court for the Northern District of California, in this case, have not been reported. They are set forth in the Appendix, *infra*.

JURISDICTION OF THIS COURT

The judgment of the Court of Appeals for the Ninth Circuit, herein sought to be reviewed, was entered on October 22, 1986. On January 12, 1987, Justice O'Connor extended the time in which this petition could be filed to February 20, 1987. Jurisdiction of this Court to grant the writ is conferred by 28 United States Code, Section 1254.

STATUTE INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, *as amended* which provides in pertinent part:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. Section 2000e-2(a).

STATEMENT OF THE CASE

The petitioner is JIN K. LEE, a Chinese male adult citizen of the United States, residing in San Francisco, California.

On August 5, 1982, petitioner filed an employment discrimination complaint *pro se*, alleging violations of Title VII with respect to respondent's faiiure to promote petitioner while he was employed at the Naval Air Rework Facility (NARF), Alameda, California, by respondent Secretary of the Navy. On November 6, 1982, petitioner, by and through his counsel, filed a first amended complaint.

On April 15, 1983, the District Court entered summary judgment for respondent on the grounds that petitioner had failed to meet the jurisdictional time limits of Title VII because his initial filing was a request for appointment of counsel.

Petitioner timely appealed that order to the Court of Appeals for the Ninth Circuit on the jurisdictional issue, and, on January 9, 1984, the Court of Appeals remanded the case to the District Court.

On April 22, 1985, a non-jury trial was held before the Honorable William H. Orrick, United States District Court Judge, Northern District of California. The District Court made findings and conclusions adverse to petitioner and entered judgment for respondent. (Appendices A and B).

On May 21, 1985, petitioner filed a timely notice of appeal from the judgment of the District Court entered in favor of respondent, and, on October 22, 1985, the Court of Appeals for the Ninth Circuit affirmed the District Court's judgment. (Appendix C)

STATEMENT OF THE FACTS

Petitioner, JIN K. LEE, is a native of China and a citizen of the United States who has resided in this country since 1938. In 1946, petitioner began his ca-

reer as an employee of the Alameda Naval Air Station, after service in World War II as an aircraft mechanic in the Air Force. In 1959, petitioner was promoted to Aircraft Engine Inspector (now designated Quality Assurance Specialist), a position which he held until his retirement in 1980, at which time he had served NARF for over thirty-four (34) years. During the last 21 years of petitioner's service with respondent, he did not receive a single promotion.

During his career as an inspector, petitioner applied several times for promotions above his WG-11 grade. Petitioner's complaint concerned two such applications, one for an Aircraft Engine and Examiner position ("E & E"), pursuant to promotional opportunity announcement No. OC-12-76, the other for a position as a Planner and Estimator/Progressman pursuant to announcement No. OC-76-182. The appeal to the Ninth Circuit and this petition only concerns petitioner's application for announcement No. OC-12-76.

Permanent appointment to either of the two positions petitioner sought entailed success in a detailed and formal application and screening process which was described in the trial testimony of respondent's witness, Cheryl DeMong. This process involves the use of a rating panel which is appointed to score each application against a set of criteria known as the crediting plan. The rating panel then refers a list of the highest-scored candidates to the selecting officer who makes the final ranking decision. The applicants so rated are then drawn upon to make successive referral lists as new vacancies arise.

In addition to these applications for promotions, petitioner several times sought to be detailed to temporary vacancies in Engine and Examination positions

by speaking directly to the E & E supervisor, Charlie Morris. Such detailing would have enhanced petitioner's prospects for permanent promotion. Petitioner was not selected for either of the two positions which he sought, although he was referred for selection for one of the vacancies filled from promotional opportunity No. OC-76-182. Morris never detailed petitioner to any of the temporary vacancies he sought to fill.

Mr. Morris not only controlled the opportunities for which petitioner sought to be temporarily detailed in the E & E line, he also served on the ranking panel that ranked all of the applicants for the OC-12-76 permanent promotion. As a member of that ranking panel, Mr. Morris became one of the two individuals assigned to rank petitioner's application for the E & E position. These two individuals assigned petitioner a score of 20 and 19 respectively; petitioner's composite score of 19.5 was 1 point lower than that of any person referred to the selecting officer by the rating panel and 2.5 points lower than that of any person ultimately selected for the position.

Regarding promotional opportunity announcement No. OC-12-76, the testimony at trial was uncontradicted that Mr. Morris told petitioner "Lee, you wouldn't stand a 'Chinaman's' chance [of being detailed to E & E]." Although evidence was introduced that petitioner at least initially took the "Chinaman's chance" remark "as a joke," his testimony on cross-examination made it clear that he ultimately viewed his former friend as having shot him down. Mr. Morris was apparently available to the defense as a witness, as he was included on respondent's witness list but was not called.

The District Court found that there was "no indication that any person who rated plaintiff considered any non-merit factors," and that "there was no evidence that Mr. Morris rated plaintiff in a discriminatory manner. (Appendix A at 2a & 3a, Findings of Fact Nos. 6 and 8)

As petitioner argued in the Court of Appeals, these findings by the District Court were clearly erroneous because there was direct evidence of unlawful motive on the part of one person, Mr. Morris, who played a critical role in rating petitioner for the E & E promotion. Moreover, Morris was available as a witness to deny the statement but was not called by the government at trial.

In addition, the District Court's finding of "no discrimination" is also clearly erroneous since the critical role Morris played in the overall evaluation and selection process, compelled a finding that discrimination based on race or national origin infected the selection process. (Appendix A at 3a)

The District Court concluded that, while petitioner had established a *prima facie* case of discrimination, and that respondent had articulated a legitimate, nondiscriminatory reason for petitioner's rating, petitioner failed to show that respondent's reasons were pretextual. Appendix A at 4a)

Applying the clearly erroneous standard of review, the Court of Appeals held "we are satisfied that the district court decided 'the question of discrimination based on the entire case,' and that its finding was not clearly erroneous." (Appendix C at 10a)

REASONS FOR GRANTING THE WRIT

This Case Presents A Significant Question Of Federal Law Which Has Created Conflict Among The Circuits And Which Has Not Been, But Should Be Decided By This Court.

This Court should grant review in order to resolve a substantial, recurrent question not heretofore decided by this Court, viz, whether, the *McDonnell-Douglas* formula applies when direct evidence of racial animus is present.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and later in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), this Court set forth the prevailing standard for allocation of the burdens of proof in employment discrimination cases. The formula developed by the Court allows for three (3) separate and discrete steps in most cases: (1) the employee must establish a prima facie case of unlawful discrimination; (2) the employer must articulate a legitimate, non-discriminatory reason in order to rebut the prima facie case; and (3) the employee must then have an opportunity to prove that the employer's articulated reason was a pretext to conceal unlawful discrimination. *McDonnell-Douglas, supra* at 802-04.

Subsequent to this Court's decisions in *McDonnell-Douglas* and *Burdine*, the federal circuits have grappled with the question of whether the *McDonnell-Douglas* formula applies when direct evidence of racial animus is before the trial court.

The Eleventh Circuit has repeatedly held that this standard of proof is inapplicable when direct evidence of discrimination is present. For example, in *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir.

1985), the Eleventh Circuit reversed a judgment on the merits for the defendant in a Title VII case because the trial court had erroneously applied the *McDonnell-Douglas* test without specifically stating whether or not it believed the plaintiff's proffered direct evidence of discrimination. *Thompkins, supra* at 564. Plaintiff had offered proof that the president and the vice-president of the defendant college had each made statements reflecting a bias against women with respect to the employment practice at issue.

The Eleventh Circuit held the *McDonnell-Douglas* rebuttal specification inadequate in the face of direct evidence of discrimination and posed two alternatives for the trial court. First, it might have disbelieved the uncontradicted testimony; but, if so, it should have explained why. In the alternative, the trial court might have found that testimony credible. If so, the court's ultimate finding in favor of defendant was clearly erroneous. *Id.*

The Eleventh Circuit has reached a similar result in an age discrimination case, holding that direct evidence of an employer's state of mind took the case out of the required allocation of proof articulated in *McDonnell Douglas. Lindsey v. American Cast Iron Pipe Co.*, 772 F.2d 799 (11th Cir. 1985).

This Court has held that in an age discrimination case under the ADEA, the *McDonnell-Douglas* test does not apply where the plaintiff presents direct evidence of discrimination. *TWA v. Thurston*, 469 U.S. 111, 105 S.Ct 613, 622 (1985), relying on *Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977).

The District Court found that petitioner had established a *prima facie* case of discrimination on the

basis of *McDonnell-Douglas* and *Burdine*. (Appendix A at 3a & 4a) Thus, the District Court was obligated to consider the direct evidence as a part of plaintiff's rebuttal evidence to defendant's articulation of a legitimate, non-discriminatory grounds for its' action. The District Court failed to do so.

The error that both the District Court and the Court of Appeals made relates to their respective treatment of the evidence of racial animus. The District Court failed to make a finding as to whether or not the direct evidence of racial animus affected the rating which petitioner received from the rating panel or affected Mr. Morris' refusal or failure to detail petitioner to the E & E position. The Court of Appeals adhered to a rigid, mechanistic application of the *McDonnell-Douglas* formula and failed to determine whether or not, as a matter of law, petitioner's direct evidence of racial animus rebutted the employer's articulated rationale for its treatment of the petitioner or whether or not such evidence required a different analysis and approach to the relative burdens of the parties. Where direct evidence of racial animus is offered, unless trial courts and appellate courts depart from *McDonnell-Douglas*, it is useless for Title VII litigants to offer direct evidence of racial animus, for it may be conveniently factored out of the decision-making process.

To avoid this error, most recently, in *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986), the Eleventh Circuit held that where there is direct evidence of discrimination, the *McDonnell-Douglas* formula is inapplicable. In *Wilson*, plaintiff, a Black, male applicant for employment as a police officer in Aliceville, Alabama, sought to introduce testimony at trial that

the Mayor of Aliceville stated "that he wasn't gonna let no Federal government make him hire no goddam nigger" *Id.* at 633. The trial court refused to admit this statement upon defendant's evidentiary objections and an ultimate verdict in favor of defendant city was reached.

The Eleventh Circuit, relying on such earlier appellate decisions as *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 (11th Cir. 1985); *Bell v. Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983), *cert. denied*, 467 U.S. 1204 (1984); and *Lee v. Russell County Bd. of Education*, 684 F.(2d 769, 774 (11th Cir. 1982), held that such direct evidence of discrimination cannot be met by a *McDonnell-Douglas* rebuttal. *Id.* at 634. In *Wilson*, the court of appeals held the statement to be an unambiguous racial slur and found the statement to be highly probative on the issue of racial discrimination. *Id.* at 634.

Petitioner urged the Court of Appeals for the Ninth Circuit to follow the Eleventh Circuit's lead in recognizing that when direct evidence of racial animus is present, the *McDonnell-Douglas* formula does not apply. The Ninth Circuit specifically refused to follow the Eleventh Circuit's reasoning:

> "We believe that *McDonnell-Douglas* is apposite here. We decline to adopt the Eleventh Circuit's modification of the *McDonnell-Douglas* allocation of burdens that Lee urges. *See, e.g., Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986). (Appendix C at 10a)

As a result of the Ninth Circuit's refusal to recognize that the *McDonnell-Douglas* test is not the exclusive means of proving a case of disparate treatment

in employment, this issue has created a conflict among the circuits which requires this Court to resolve. Continued reliance on the *McDonnell-Douglas* formula when compelling direct evidence of discrimination is before a trial court frustrates the intent of Title VII to redress clear-cut racial bias in employment.

When Direct Evidence Of Racial Animus Is Present, the *McDonnell-Douglas* Formula Does Not Apply.

In the present case, direct, uncontradicted and corroborated evidence of racially-derogatory slurs was introduced at trial, yet wholly ignored by the District Court. First, petitioner himself testified to Morris' statement that he did not have a "Chinaman's chance" of getting into the E & E position. Petitioner further testified that Morris told him he "didn't like . . . 'Chinamen' in E & E." Next, petitioner's witness, Finley, testified to having been present on the occasion of the "Chinaman's chance" remark and confirmed it. This testimony placed Morris' statements in the context of petitioner's request of Morris that he be detailed to E & E, when temporary vacancies arose, a request which Morris had the authority to grant or deny. Finally, respondent's own witness, Hegger, testified that Morris "figured he could say anything he wanted," including the use of "racially derogatory terms in a nonmalicious way," "in a kidding way." All of this evidence was uncontradicted.

Petitioner's opportunity to obtain the E & E position for which he applied was directly controlled by Morris as well as the other members of the ranking panel. In a discussion which occurred after petitioner's rating, Morris made the racial slur. The District Court

appeared to credit the testimony of the two witnesses with respect to the fact that the remark was indeed made and its context. Significantly, respondent offered no evidence which would contradict the inference which logically must be deduced from the remark. That is, that petitioner's national origin was relevant to Morris' assessment of his promotability into the E & E department and that this relevance was negative. Morris was available to respondent as a witness but was never called to deny or even explain the statement.

The evidence was clear that Morris knew petitioner well and appeared to have had much opportunity to observe his work. Although the rating process required that raters be instructed to ignore their personal knowledge of the applicants and consider only the paper evidence before them, the record offers no assurance that Morris did not negatively influence the other members of the rating panel.

Petitioner was entitled to be evaluated by a panel comprised of members uninfluenced by any unlawful motive. Title VII commands such a non-discriminatory process:

> All personnel actions affecting employees . . . in military departments . . . shall be made free from any discrimination based on race, color, religion, sex or national origin. 42 United States Code, Section 2000e-16(a).

A decision in which even one of several decision makers has admitted an unlawful motive with respect to race or national origin, flies in the face of Title VII's prohibition.

The District Court found the evidence of the racial slur credible, since Finding of Fact No. 8 states that Morris made a discriminatory remark. (Appendix A at 3a) However, the District Court dismissed the slur as no evidence that Morris rated plaintiff in a discriminatory manner. In fact, the District Court engaged in colloquy with counsel in closing argument repeatedly emphasizing that he had heard testimony of but one racial slur. Yet even singular admission of unlawful motive was compelling evidence of an evaluating officer's state of mind.

The District Court's casual view of the racial slur belongs to an era that preceded the enactment of the Civil Rights Act of 1964 by more than one hundred (100) years. Even a cursory review of the legal and historical discrimination endured by persons of Chinese descent in this country demonstrates that the District Court's reticence to equate the racial slur with direct evidence of discrimination was erroneous.

In 1854, the California Supreme Court held that the Chinese were not allowed to present testimony in a court of law. *People v. Hall*, 4 Cal. 399 (1854). This decision resulted in a literal onslaught of murdering and robbing of Chinese by whites who knew they were immune from prosecution for their crimes.

Although the Chinese vigorously attempted to defend their legal rights, the passage of the Exclusion Law in 1882 marked the beginning of an official national policy of racial discrimination against the Chinese in the United States. As a result of this policy, Chinese workers were precluded from immigrating to this country and denied the right of citizenship.

Shortly after the Exclusion Law, several other racially-discriminatory laws were enacted by Congress subjecting the Chinese to further injustice. In fact, from 1882 to 1902, thirteen (13) such discriminatory laws were enacted against the Chinese.

It was during this approximate period that the phrase "Chinaman's chance" came into use to refer to a hopeless situation.

At trial, petitioner's witness Finley testified, "To the Chinese [the word, Chinaman, is] the same thing as the word nigger means when you express that expression."

> "Although the slang epithet "nigger" may once have been in common usage, along with . . . other racial characterizations . . . [it] has become particularly abusive and insulting in light of recent developments. . . . The same conclusion is compelled with regard to Mexican-Americans and the various slang epithets that may have once been in common usage regarding them." *Contreras v. Crown Zellerbach Corp.*, 565 P.2d 1173, 1177 (1977), *quoting Alcorn v. Anbro Engineering, Inc.*, 2 Cal. 3d 493, 498 n.4 (1970).

Such racial epithets, which were once part of common usage, and now are regarded as insulting and offensive language have no non-discriminatory utility. *See*, Delgado, *Words That Wound. A Tort Action For Racial Insults, Epithets, and Name Calling*, 17 Harv. C.R.-C.L.L.Rev. 133, 145 (1982) and S. Hayakawa, *Symbols, Status And Personality* at 25 (1963).

Morris' use of the phrase "Chinaman's chance" served only one function in his speech—to distinguish petitioner by his race and national origin from those

who are not Chinese. Since his comments concerned petitioner's prospects for work in the E & E section, the inference that petitioner's race and national origin were important factors with respect to those prospects is compelling. Only Morris, as the speaker, could dispel that inference.

CONCLUSION

For the reasons stated, petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

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February 19, 1987

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. C-82-4174-WHO

JIN K. LEE,

Plaintiff,

vs.

JOHN LEHMAN, Secretary of the Navy,

FILED

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ORDER

This employment discrimination and retaliation case is brought by Jin K. Lee, a Chinese male, against his former employer, Naval Air Rework Facility ("NARF"), Alameda. Plaintiff complains that he was not selected for various promotional opportunities because of race and national origin discrimination, and because of retaliation for prior Equal Employment Opportunity ("EEO") activities. Plaintiff retired from NARF in August, 1980, after over 37 years of government service.

A bench trial was held in this matter on April 22, 1985. Based upon the testimony of the witnesses, the exhibits offered and received into evidence, and all the papers and records on file in this case, this Court finds no discrimination or retaliation and makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Plaintiff is a Chinese male who was employed by NARF for over 37 years at the time of his retirement in 1980.

2. In 1976 and 1977, Plaintiff applied for two promotional positions. Those positions were: 1) Planner/Estimator Progressman (A/C Engine Mechanic) WD-8202-08, under promotional opportunity number 76-182 ("Pro-Op 76-182"); and 2) Aircraft Examiner (A/C Engine Mechanic—WD-8602-06, under promotional opportunity number 12-76 ("Pro-Op OC-12-76").

3. Pursuant to Pro-Op 76-182, five permanent selections were made. Of the five persons selected, two were Black, and three were White. Two Asians were rated high enough to be referred for selection. All five persons ultimately selected had higher rating scores than did plaintiff. Pro-Op 76-182 was reactivated on one occasion to fill a temporary promotion. Plaintiff was referred for selection along with nine other applicants, but was not ultimately selected. The person selected for the position had a higher rating score than did plaintiff.

4. Pursuant to Pro-Op OC-12-76, five permanent selections were made. Of the five persons selected, two were Hispanic, two were White and one was Black. All five persons selected had higher rating scores than did plaintiff. One Asian was rated high enough to be referred for selection.

5. For both Pro-Ops, the ranking panel included, among others, one Asian. Each time, plaintiff was rated independently by two persons. For Pro-Op 76-182, both persons gave plaintiff the same rating score. For Pro-Op OC-12-76, plaintiff was given independent rating scores within one point of each other.

6. Ranking panels were specifically instructed not to consider any non-merit factors, such as national origin or

race, when rating the applicants. There is no indication that any person who rated plaintiff considered any non-merit factors.

7. Each ranking panel included a member whose function was to contact the Commanding Officer of NARF if any discrimination occurred during the rating process. There was no indication of any misconduct on the part of the EEO member of the panels that assigned plaintiff his rating scores and no reports of discrimination were shown to have been made.

8. There was evidence that Mr. Charles Morris, who rated plaintiff's application as a member of a ranking panel, made a racially discriminatory remark. However, there was no evidence that Mr. Morris rated plaintiff in discriminatorily manner. Mr. Morris, in fact, rated plaintiff higher than did the other panel member who independently assigned plaintiff a rating score.

9. Plaintiff served on the Commander's Advisory Committee on Equal Employment Opportunity in 1965-66. Although this fact was noted on plaintiff's applications, and was therefore within the knowledge of the persons rating plaintiff's application, there was no evidence of any causal connection between plaintiff's EEO activities in 1965-66 and the evaluation of plaintiff's applications ten years later in 1976 and 1977. Rather, the only testimony on the subject indicated that, if anything, plaintiff's prior EEO activities may have been considered in a positive light in that such activities demonstrated an ability to work and communicate with people.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-5.

2. Plaintiff has satisfied his burden of proving a *prima facie* case of discrimination. *See McDonnell Douglas Corp*

v. Green, 411 U.S. 792 (1973); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). First, plaintiff belongs to a racial minority (Chinese). Second, plaintiff applied for and was qualified for both promotional opportunity positions. Third, despite plaintiff's qualifications, he was rejected. And fourth, the positions were later filled with persons of plaintiff's general qualifications.

3. Defendant has satisfied its burden of articulating a legitimate, nondiscriminatory reason for plaintiff's rejection. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. at 258. Plaintiff was rated according to a highly standardized and objective process, and those persons selected for the positions were rated higher than was plaintiff.

4. Plaintiff has failed to show that the defendant's legitimate, nondiscriminatory reasons were pretextual. *See McDonnell Douglas Corp. v. Green*, 411 U.S. at 805.

5. Plaintiff has failed to establish a *prima facie* case of retaliation. Although plaintiff has established that he engaged in the protected activity of serving on the Commander's Advisory Committee on Equal Employment Opportunity and that he thereafter was not chosen for the promotional opportunity positions, plaintiff has failed to establish any causal link between the two. *See Cohen v. Fred Meyer, Inc.*, 686 F.2d 793, 796 (9th Cir. 1982). There is simply no evidence to establish that plaintiff was rated in any particular manner, or not selected for the Pro-Op positions, due to any EEO activity engaged in ten years earlier.

6. Even if a causal link had been established, plaintiff has not shown that the legitimate, nondiscriminatory reason for nonselection was pretextual.

Therefore, IT IS HEREBY ORDERED that:

1. Plaintiff take nothing by this complaint and judgment will be entered for defendant.

2. Defendant shall lodge with the Court a proposed judgment consistent with the above findings of fact and conclusions of law by May 10, 1985.

DATED: April 25, 1985.

/s/ WILLIAM H. ORRICK
WILLIAM H. ORRICK
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

Civil No. C-82-4174-WHO

JIN K. LEE,

Plaintiff,

v.

JOHN O. LEHMAN, Secretary of the Navy,

Defendant.

FILED

APR 30 1985

JUDGMENT

This action having come before the court for trial, the Honorable William H. Orrick presiding, the issues having been duly tried, the court having been fully advised in the premises, and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED that judgment be entered for defendant John O. Lehman, Secretary of the Navy, in accordance with the Findings of Fact and Conclusions of Law entered on April 26, 1985, each party to bear their own costs and attorney fees.

/s/ WILLIAM H. ORRICK
WILLIAM H. ORRICK
United States District Judge

Dated: APRIL 30, 1985

APPENDIX C

Not For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 85-2087

D.C. No. C-82-4174-WHO

JIN K. LEE,
Plaintiff/Appellant,

v.

JOHN LEHMAN, Secretary of the Navy,
Defendant/Appellee.

FILED

OCT 22 1986

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
District Judge William H. Orrick, Presiding

Submitted August 13, 1986—San Francisco

Before: WRIGHT and FARRIS, Circuit Judges, and RHOADES,** District Judge.

We are asked to decide whether the district court erred in finding that the failure to promote Lee was not a result

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R.21.

** Of the Southern District of California.

of racial or national origin discrimination. The district court's finding was not clearly erroneous and we affirm.

Lee, a native of China and a citizen of the United States, was employed by the Navy in various positions, including aircraft mechanic and aircraft engine inspector, since 1946. He voluntarily retired in 1981.

The instant action concerned two applications for promotion above Lee's WG-11 grade: for Aircraft Engine and Examiner position ("E & E"), and for Planner and Estimator/Progressman. This appeal concerns only the former application.

Lee alleges that he was denied promotion to E & E because of the racial animus of the E & E Supervisor, Mr. Charles Morris ("Morris"). Morris had been one of two members of a "rating panel" that rated Lee for the E & E position. The trial court below elicited Lee's testimony that Morris had said he "did not like the Chinamen—Chinamen in E & E." RT 53:15-16. In addition, Lee testified that Morris, in response to Lee's inquiry concerning the possibility of Lee's being "detailed" to E & E, stated "Lee, you wouldn't stand a 'Chinaman's' chance . . . ." RT 183:21-23. A witness at trial corroborated the latter remark. Morris was not called as a witness, and neither statement was rebutted.

In general, permanent appointment to either of the two positions Lee sought involves an elaborate application and screening process. All factors considered in rendering a decision are reduced to writing. A "rating panel," consisting of individuals familiar with the requirements of the position applied for, is appointed to score each application against a set of criteria known as a "crediting plan." The panel then refers a list of the highest scored candidates to the selecting officer. An applicant can enhance his or her chances by being "detailed" to temporary vacancies in the positions sought.

In the instant action, the ranking panel for the E & E position gave Lee a composite score of 19.5 (Morris gave Lee a score of 20, and the other panel member assigned Lee a score of 19. Lee's score was one point lower than that of any other person referred to the selecting officer, and 2.5 points lower than that of anyone ultimately selected for the position.

After a bench trial, the district court entered judgment in favor of the defendant. The court found that there was no indication that anyone who rated Lee had considered non-merit factors, and in particular, that there was no evidence that Morris rated Lee in a discriminatory manner. The court also found that no reports of discrimination in the rating process were made. While the district court determined that Lee had made out a *prima facie* case of discrimination, and that the defendant had articulated a legitimate, non-discriminatory reason for Lee's rejection, it concluded that Lee failed to show that defendant's reasons were pretextual.

Findings of fact are reviewed for clear error. *United States v. McConney*, 720 F.2d 1195, 1200 (9th Cir.) (en banc, *cert. denied*, 105 S.Ct. 101 (1984). Discrimination is an ultimate question of fact. *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 715 (1983). To overturn findings of fact after a review of the record, the reviewing court must be left with the "definite and firm conviction that a mistake has been committed." *McAllister v. United States*, 348 U.S. 19, 20 (1954).

In reaching its conclusion on discrimination, the district court applied the analysis first set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973), and explained in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The Ninth Circuit applies this analysis in either a Title VII or a § 1981 case alleging disparate treatment. *See, e.g., Atonio v. Wards Cove Packing Co., Inc.*, 768 F.2d 1120, 1125 (9th Cir. 1985).

In *McDonnell-Douglas*, the Supreme Court focused on the proper allocation of burdens of proof in private, non-class action Title VII cases such as the case at hand. We believe that *McDonnell-Douglas* is apposite here. We decline to adopt the Eleventh Circuit's modification of the *McDonnell-Douglas* allocation of burdens that Lee urges. *See, e.g., Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986).

The *McDonnell-Douglas* allocation of burdens has the effect that "after plaintiff's prima facie case and defendant's 'articulation,' the trier of fact decides that question of discrimination based on the entire case." *Kimbrough v. Sec'y of United States Air Force*, 764 F.2d 1279, 1283 (9th Cir. 1985), explaining *Aikens, supra*, 460 U.S. at 714-715. Given the elaborate and standardized selection process, the fact that no reports of discrimination in the rating process were made, the fact that Lee's score was one point lower than the lowest score of anyone referred to the selecting officer and 2.5 points lower than anyone ultimately selected, and the fact that Morris rated Lee higher than the other member of the rating panel, we are satisfied that the district court decided "the question of discrimination based on the entire case," *id.*, and that its finding was not clearly erroneous.

The defendant's request for attorney's fees is denied. There is no indication that Lee's appeal was frivolous, unreasonable or without foundation. *Boatowner and Tenants Association v. Port of Seattle*, 716 F.2d 669, 674 (9th Cir. 1983).

AFFIRMED.

Supreme Court, U.S.
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No. 86-1368

In the Supreme Court of the United States

OCTOBER TERM, 1986

JIN K. LEE, PETITIONER

v.

JAMES H. WEBB, SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded in this Title VII case that the district court's findings of fact on the question of illegal racial motivation were not clearly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 7a-10a) is unreported. The opinion of the district court (Pet. App. 1a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1986. On January 12, 1987, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 20, 1987. The petition was filed on February 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a native of China and a citizen of the United States, was employed at the Alameda Naval Air Station from 1946 until his retirement in 1980. In 1959 he was promoted from aircraft mechanic to a position now referred to as Quality Assurance Specialist. On November 16, 1976, petitioner applied for a vacancy as an Aircraft

Examiner (WD-8602-06), under promotional opportunity number 12-76 (Pro-Op OC-12-76). Pet. App. 2a, 8a.[1] Petitioner's application was considered in accordance with the standard procedures applicable to promotion decisions. First, a "rating panel" issued a written evaluation of each applicant, assessing the candidate's qualifications with respect to a uniform set of criteria established by regulations ("crediting plan"). Petitioner received a score of 19.5. The panel then referred to the selecting officer the applicants with the highest scores; that group included two Asians and did not include anyone who scored below 20.5. The selecting officer ultimately made five appointments from that group of recommended applicants—two Hispanic people, two white people and one black person. Of the persons appointed, the lowest rating score was 22. Pet. App. 2a-3a, 8a.

One of the members of the rating panel that considered petitioner's application was Charles Morris. Morris assigned petitioner a score of 20. The other member of the panel assigned petitioner a score of 19. Petitioner was not referred to the selecting officer for appointment, as his composite score of 19.5 was one point lower than that of any person referred to the selecting officer (and 2.5 points lower than that of any person actually selected for the vacant positions). Pet. App. 9a.

2. Petitioner filed this suit, alleging a violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2 (a).[2] To support his claim of racial discrimination, peti-

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[1] Petitioner also applied for another vacancy in a permanent position and, on several occasions, applied to be detailed to temporary vacancies in Engine and Examiner (E & E) positions, but he makes no claim in this Court about those applications. See Pet. App. 2a, 8a.

[2] 42 U.S.C. 2000e-2(a) provides:

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

tioner relied principally on his allegation that after the ratings had been made and petitioner requested a temporary assignment in the E & E Department,[3] Morris told him: " 'Lee, you wouldn't stand a "Chinaman's" chance [of getting into the E & E position]' " (Pet. 5, 11).[4]

Following trial, the district court dismissed the complaint. The court found (Pet. App. 4a) that although petitioner had established a prima facie case of illegal race discrimination under *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), the highly standardized process that resulted in the selection of persons with superior ratings amounted to a legitimate, nondiscriminatory reason for the challenged promotion decision. The district court also rejected petitioner's contention that Morris' racial reference constituted evidence of discrimination in Morris' rating decision. As the court noted, Morris rated petitioner higher than did the other member of the rating panel (Pet. App. 3a). The district court thus concluded that plaintiff had failed to carry the burden of proving intentional discrimination (*id.* at 3a-4a).

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respect to this compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

[3] The record indicates that temporary assignments were made from among those with the highest scores. Petitioner had a lower score than anyone selected for the temporary assignments he sought. See. Pet. App. 8a; Tr. 21-22, 51.

[4] In testimony at an EEOC hearing that was introduced into evidence at the trial in this case, petitioner characterized Morris' remark as follows (Tr. 56): "He make a joke, or * * * I take it as a joke."

3. The court of appeals affirmed, holding that the district court had decided "the question of discrimination based on the entire case" and its findings were not clearly erroneous (Pet. App. 7a-10a).

ARGUMENT

The decision of the court of appeal is correct and does not conflict with any decision of this Court or of any other court of appeals. In any event, as this case turns on factual findings in which both courts below concurred, further review by this Court is not warranted.

1. In Title VII cases involving allegations of disparate treatment the ultimate question is the factual issue of defendant's motivation. *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 714 n.3 (1983) ("the plaintiff may prove his case by direct or circumstantial evidence. The trier of fact should consider all the evidence, giving it whatever weight and credence it deserves"). The ultimate burden of persuasion is upon the plaintiff; this burden never shifts to defendant. Where, as here, the trial court evaluates all of the evidence presented by both parties and reaches a conclusion on the factual issue of motivation, appellate review is limited to determining whether the findings of fact are clearly erroneous. *Anderson* v. *City of Bessemer City,* 470 U.S. 564 (1985). See *City of Pleasant Grove* v. *United States,* No. 85-1244 (Jan. 21, 1987), slip op. 9-10. In this case, as both courts below held, there was ample support in the record for the finding that respondent did not have a discriminatory motive.

2. There is no merit to petitioner's contention (Pet. 7) that the model of proof established in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), should be disregarded. Petitioner bases his argument on the contention that the record in this case con-

tains "direct proof" of racial animus. But, both courts below found that there was no evidence of racial animus in the promotion decision. And this Court has never held that the mere *presentation* of "direct evidence" shifts the burden of proving illegal motivation from the plaintiff to the defendant. In *United States Postal Service Board of Governors* v. *Aikens*, 460 U.S. at 714 n.3, the Court stated that whether the evidence is direct or circumstantial, the "trier of fact should consider all the evidence, giving it whatever weight and credence it deserves." Moreover, in *Johnson* v. *Transportation Agency*, No. 85-1129 (Mar. 25, 1987), slip op. 8, where direct evidence established that gender was a controlling factor in a promotion decision, the Court, citing *McDonnell Douglas*, stated: "Once a plaintiff establishes a prima facie case that race or sex has been taken into account in an employer's employment decision, the burden shifts to the employer to articulate a nondiscriminatory rationale for its decision;" if the defendant articulates such a reason, "the burden shifts to the plaintiff to prove that the employer's justification is pretextual * * *."[5]

3. Petitioner contends that the Ninth Circuit's decision in this case conflicts with decisions in the Eleventh Circuit. The Eleventh Circuit holds that where a plaintiff establishes its prima facie case by direct evidence of discriminatory motive for the challenged action, the employer must carry a preponderance burden rather than

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[5] The suggestion in *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121 (1985), that "the *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination" arose in a wholly different context. Motive was not at issue in *Thurston*. The Court held that since defendant was utilizing a facially-proscribed classification, defendant could not justify its action by articulating a "legitimate, nondiscriminatory reason" but would have to justify its discrimination by establishing one of the statutory defenses such as " 'bona fide occupational qualification' " (*id.* at 122).

simply the burden to articulate a legitimate non-discriminatory reason, in order to prevail. *Wilson* v. *City of Aliceville*, 779 F.2d 631, 634 (11th Cir. 1986); *Thompkins* v. *Morris Brown College*, 752 F.2d 558, 563 (11th Cir. 1985); *Miles* v. *M.N.C. Corp.*, 750 F.2d 867, 875 (11th Cir. 1985); *Bell* v. *Birmingham Linen Service*, 715 F.2d 1552, 1556 (11th Cir. 1983); *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d 769, 774 (11th Cir. 1982). Petitioner correctly notes that the court of appeals in this case explicitly declined to adopt the Eleventh Circuit rule (Pet. App. 10a). However, the disagreement between the Circuits on this issue of burden shifting under Title VII arises only from dicta in the decision of the court below, and thus does not support the granting of the petition.

The rationale for the Eleventh Circuit rule is that where direct evidence that the challenged action was based on discriminatory motive is "accepted by the trier of fact, the ultimate issue of discrimination has been proved." *Miles* v. *M.N.C. Corp.*, 750 F.2d at 875; *Bell* v. *Birmingham Linen Service*, 715 F.2d at 1557; *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d at 774-776. Where a trial judge finds that certain evidence directly demonstrates a discriminatory motive for the challenged conduct, there is no need to draw further inferences in order to conclude that the discrimination occurred. Thus, the defendant cannot prevail by merely going forward to articulate a legitimate non-discriminatory reason for its action, but must necessarily prove his legitimate motivation by a preponderance of the evidence. *Ibid.*

The circumstances necessary to trigger the Eleventh Circuit rule, were it the governing law, are not presented here. The racial references by Morris, which petitioner initially took as a joke, were not accepted by the district court as direct evidence of discriminatory motivation in the promotion process. In the context of all the facts, including the fact that Morris rated petitioner higher than the other person who rated him, the district court concluded that there

was "no evidence" that Mr. Morris rated petitioner in a discriminatory manner. Under the Eleventh Circuit's approach, it is the trier of fact's acceptance of the direct evidence as establishing discriminatory motivation of the challenged action that justifies placing a heavier burden on the defendant. *Miles* v. *M.N.C. Corp.*, 750 F.2d at 875; *Bell* v. *Birmingham Linen Service,* 715 F.2d at 1557; *Lee* v. *Russell County Bd. of Educ.*, 684 F.2d at 774-776. The district court's rejection in this case of petitioner's evidence as not probative on the ultimate issue of discrimination certainly was not clearly erroneous, and thus the court of appeals' rejection of the Eleventh Circuit rule was dicta not meriting the attention of this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, JIN K. LEE, replies herein to respondent's brief filed in opposition to the petition for writ of certiorari.

The gravamen of respondent's opposition is that contrary to petitioner's argument, the decision of the Ninth Circuit Court of Appeals below does not conflict with any decisions of this Court or of any other federal circuit. (Respondent's Brief at 4).

Respondent's position is wholly devoid of merit. It is premised on persuading this Court that the Ninth Circuit's reference to the applicable Eleventh Circuit decisions is mere dicta. (Respondent's Brief at 6)

In proffering this argument, respondent ignores that the Ninth Circuit specifically declined to adopt

the Eleventh Circuit rule which appropriately removes petitioner's case from the traditional *McDonnell-Douglas* formula. (Appendix C of the Petition for Writ of Certiorari at 10a)

Respondent argues that the record below is bereft of any evidence to support a discriminatory motive on the part of respondent. This conclusion is truly ingenious in light of the unrebutted trial testimony of petitioner and eyewitness Finley who corroborated that Morris made the "Chinaman's chance" slur in the latter's presence. Moreover, the statement's racially disparaging meaning and context, in light of the speaker's control over petitioner's promotional opportunities, were abundantly clear to both petitioner and this eyewitness.

Respondent urges that "the circumstances necessary to trigger the Eleventh Circuit rule" were not present in petitioner's case. (Respondent's Brief at 6) Respondent states that the racial references by Morris, petitioner's supervisor, were initially taken by petitioner as a joke, and not accepted by the district court as direct evidence of discriminatory motive in the promotion process. (*Ibid.*) That is, the evidence of racial animus introduced by petitioner simply did not rise to the evidence required to remove the case from the *McDonnell-Douglas* proof modality.

The record itself dispels the notion that petitioner dismissed Morris' clearly discriminatory state of mind as mere humor. Petitioner unequivocally testified on cross-examination that he did not take Morris' "Chinaman's chance" statement as a joke, and that he interpreted the statement to mean that he had no chance whatsoever to earn a promotion.

Respondent persists in disregarding this racial animus as direct evidence of an employer's discriminatory motive in refusing to promote a member of a protected class. The fact that the speaker of the racially derogatory statement was a member of the rating and ranking panel who may not have individually rated petitioner lower is irrelevant. The perils of subjective employment processes are well-known. Petitioner was entitled to be evaluated by a panel entirely uninfluenced by any discriminatory motive. Any defect in the evaluation process, regardless of the motivating actor, deprived petitioner of fair and equal treatment under the protections of Title VII.

Respondent artfully dodges this direct evidence of discrimination, sufficient to impose the Eleventh Circuit's reasoning in such recent cases as *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986); and *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir. 1985). There, the Court of Appeals held that where such direct evidence of discrimination is present, the *McDonnell-Douglas* formula does not apply.

Here, as in *Wilson* and *Thompkins*, the derogatory statement directed at the employee by the employer is compelling direct evidence of discrimination. It is further significant that respondent below offered no evidence or testimony whatsoever to refute or even explain the "Chinaman's chance" slur. In the absence of such a rebuttal, this direct evidence of racial animus was more than sufficient to meet the requisite showing under the Eleventh Circuit's precedent holding that such evidence successfully rebutted respondent's proffered articulation for its employment decision.

The question presented in this petition is an extremely critical one which yearns for clarification from this Court. This particular case demonstrates that the federal circuits are confused and in conflict as to the applicable proof modality when compelling evidence of direct discriminatory motive exists.

It is precisely the trier-of-fact's failure to accept the direct evidence admitted at trial as establishing discriminatory motive that petitioner appeals. The Ninth Circuit's refusal to adopt the Eleventh Circuit's approach to such cases is not mere dicta precluding review by this Court. Rather, the Ninth Circuit's decision declining to adopt another circuit's proven and consistently upheld formula demonstrates the need for this Court to provide direction for future cases. Accordingly, petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

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May 13, 1987